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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1983

TRUDY UNGER,

Petitioner,

vs.

CONSOLIDATED FOODS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it decided substantial new issues raised on the remand from this Court without hearing oral argument in violation of Rule 34 of the Federal Rules of Appellate Procedure?

2. Did the Court of Appeals err when it failed to correct that error by expanding the time for filing a petition for rehearing in order to permit oral argument?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OFFICIAL REPORTS IN EARLIER PROCEEDINGS

The opinion of the Court of Appeals on the remand is reported as *Unger* v. *Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir., 1982). The opinion is not reproduced since the sole issue on this Petition for Certiorari relates to the failure of the Court of Appeals to hear oral argument on the remand in violation of Rule 34 of the Federal Rules of Appellate Procedure.

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED AND STATEMENT OF JURISDICTION OF DISTRICT COURT IN ORIGINAL ACTION

1. This court has jurisdiction to review the judgment by writ of certiorari based on 28 U.S.C. Section 1254(1). This request for the discretionary writ is grounded on the fact that the Court of Appeals in hearing substantive issues without oral argument "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a) of the Rules of the Supreme Court of the United States.

2. The judgment sought to be reviewed was the order of the Court of Appeals of July 22, 1983 denying Unger's request to file a petition for rehearing at an expanded date in order to correct the Court's error in deciding the new issues raised on remand in its decision of November 26, 1982 entered without oral argument.

3. The District Court had jurisdiction of the individual action of plaintiff for violation of Title VII of the Civil Rights Act of 1964, 42 USC Section 2000e *et. seq.*

STATUTORY PROVISIONS AND RULES OF PROCEDURE INVOLVED

There are no constitutional provisions involved in this Petition.

The procedural requirements which are the subject matter of this petition are derived from various Court Rules, as follows:

1. Rule 34 of the Federal Rules of Appellate Procedure for the United States Courts of Appeals, in pertinent part in paragraphs (a) and (b) provides:

"(a) In General; Local Rule. Oral argument shall be allowed in all cases unless pursuant to local rule a panel of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed. Any such local rule shall provide any party with an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard. A general statement of the criteria employed in the administration of such local rule shall be published in or with the rule and such criteria shall conform substantially to the following minimum standard:

Oral argument will be allowed unless

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk shall advise all parties whether oral argument is to be heard, and if so, of the time and place therefor, and the time to be allowed each side. A request for postponement of the argument or for allowance of additional time must be made by motion filed reasonably in advance of the date fixed for hearing."

2. Rule 14 of the local rules of the Court of Appeals for the Seventh Circuit provides in Paragraph (f):

"(f) Determination by Court Not to Hear Oral Argument. If the court, acting sua sponte or upon suggestion of an appellee seeking affirmance or an administrative agency seeking enforcement of its order, contemplates deciding an appeal without hearing oral argument, each party will be given an

opportunity to file a statement setting forth the reasons why, in its opinion, oral argument should be heard. Any suggestion for affirmance or enforcement without oral argument is unnecessary. Four copies of the suggestion with proof of service shall be filed simultaneously with 15 copies of the main brief. The suggestion is to include the party's reasons as to why oral argument is not necessary. The suggestion will not be entertained if the appeal is already scheduled for oral argument. Oral argument will be allowed in all cases except those in which a panel, of three judges, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed for one of the following reasons:

(1) the appeal is frivolous; or

(2) the dispositive issue or set of issues has been recently authoritatively decided; or

(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument."

3. Rule 19 of the local rules of the Court of Appeals for the Seventh Circuit provides, with respect to remand:

"19. When the Supreme Court remands a case to this court for further proceedings, counsel for the parties shall, within 21 days after the issuance of a certified copy of the Supreme Court's judgment pursuant to its Rule 52.3, file statements of their positions as to the action which ought to be taken by this court on remand."

4. With respect to the time for filing a petition for rehearing, Rule 40 of the Federal Rules of Appellate Procedure for the United States Courts of Appeals provides:

"RULE 40. Petition for Rehearing.

(a) Time for Filing; Content; Answer; Action by Court If Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. . ."

5. With respect to the enlargement of time requirements, Rule 26(b) of the Federal Rules of Appellate Procedure for the United States Courts of Appeals provides in pertinent part:

"(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; . . ."

STATEMENT OF THE CASE

On December 2, 1980, District Judge J. Sam Perry entered Findings of Fact and Conclusions of Law in favor of Trudy Unger in her action for discriminatory discharge on the basis of sex in violation of Title VII, 42 U.S.C.A. Section 2000e-2(a). The District Court awarded Unger $141,190.82 damages against Consolidated Foods Corporation plus reasonable attorney's fees and costs in the federal court action.

Consolidated Foods Corporation appealed. On August 14, 1981, the United States Court of Appeals for the Seventh Circuit affirmed the judgment. On the cross-appeal of Unger, the Court of Appeals allowed additional attorney's fees for services to Unger in previous state proceedings. *Unger* v. *Consolidated Foods Corporation*, 657 F.2d 909 (7th Cir., August 14, 1981).

On October 5, 1981, Consolidated Foods Corporation filed its Petition for Certiorari to this court.

On May 17, 1982, this court entered its opinion in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982) holding that prior state court proceedings barred the Title VII action.

On June 1, 1982, based on its decision in *Kremer*, this court allowed Consolidated's Petition for Writ of Certiorari, vacated the judgment and remanded this case to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Kremer* v. *Chemical Construction Corp.* with particular reference as to whether the holding in that case should be applied retrospectively. *Unger* v. *Consolidated Foods Corp.*, 456 U.S. 1002, 73 L.Ed.2d 1297, 102 S.Ct. 2288 (1982).

On the remand, the clerk's office of the Court of Appeals for the Seventh Circuit directed the attention of counsel to Local Rule 19 which provided for filing simultaneous statements of position. Accordingly, each of the parties filed simultaneous statements of position. The issue on the remand was whether *Kremer* should be applied retroactively — an entirely new issue of law and fact.

On November 26, 1982, in a decision by a panel of Judges Walter J. Cummings, Howard T. Markey, and Richard D. Cudahy, the United States Court of Appeals for the Seventh Circuit entered its opinion on the remand without hearing oral argument and without following the procedure of Rule 34 of the Rules of Appellate Procedure or Local Rule 14 relating to hearing a case without oral argument. The court departed from Rule 34 of the Rules of Appellate Procedure and Local Rule

14 by failing to schedule an oral argument, failing to advise the parties that it had decided not to schedule oral argument, and failing to give the parties an opportunity to file statements regarding oral argument. The remand opinion held that the decision in *Kremer* was to be applied retrospectively; therefore, it reversed the earlier decision by Judges Robert Sprecher, Howard T. Markey and Richard D. Cudahy on the substantive issues. *Unger* v. *Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir. 1982).

At that point, Unger did not request rehearing but, instead, on February 24, 1983, filed her Petition for Certiorari. 51 U.S. L.W. 6351. Her ground was that the error in the retroactive application of the *Kremer* decision was of sufficient importance that this court should exercise jurisdiction and allow certiorari. On April 18, 1983, this court rejected the application with Mr. Justice Blackmun voting in favor of allowing the Petition for Certiorari. 51 U.S. L.W. 3757.

On April 25, 1983, pursuant to the provisions of Rules 40 and 26(b) of the Federal Rules of Appellate Procedure for the United States Courts of Appeals, Unger filed her "Motion to Extend Time for Filing Petition for Rehearing and for Stay or Recall of Mandate." Appendix G. The motion directed the court's attention to the fact that the decision of November 26, 1982, on the remand had been entered without oral argument and that there had not previously been an application for rehearing. It asserted that the motion was not interposed for delay and that Unger had her Petition for Rehearing ready for filing instanter. The motion was addressed generally and to the panel.

Three days later, on April 28, 1983, the motion was denied by Chief Judge Walter Cummings, sitting singly. The order entered by Judge Cummings stated that the motion was not timely filed. Appendix F.

On May 2, 1983, Unger attempted to file a Motion for Reconsideration addressed to the court in banc and was advised by the Clerk's office that the motion would not be accepted for filing and her counsel was refused leave to file the document.

On May 5, 1983, Unger filed a Motion for Leave to File the Motion for Reconsideration addressed to the court in banc. On May 11, 1983, that motion was denied by Judge Cummings, sitting singly.

On May 16, 1983, Unger's attorney was advised by the Clerk's office that the Motion for Reconsideration addressed to the court should have been accepted for filing. Thereupon, on that date, Unger's attorney filed a Motion addressed to the Court of Appeals for the Seventh Circuit in banc to reconsider the denial of the motion for extension of time and to allow the filing of the Petition for Rehearing Instanter. Appendix E. In addition to addressing the issue of failure to allow oral argument, the motion challenged the ruling of Judge Cummings that a Petition for Rehearing not filed within the 14 days, as provided by Rule 40 of the Federal Rules of Appellate Procedure, would not be timely filed. In addition, the motion requested that the action of the single judge be reviewed by the panel pursuant to Rule 27 of the Federal Rules of Appellate Procedure.

On June 6, 1983, two judges of the panel, the Honorable Walter J. Cummings and the Honorable Richard

D. Cudahy, entered an order denying the motion of May 16. Appendix D. The order stated:

> "IT IS ORDERED that said motion is hereby DENIED. Although the court has the power to expand the time for filing of a Petition for Rehearing, this case does not warrant such an expansion."

Until the above order of June 6, 1983, the motions and orders entered related solely to the question of whether the court could expand the time for filing the Petition for Rehearing. The order of June 6, 1983, for the first time concluded that the court did have that power but added that the circumstances of the case did "not warrant such an expansion." On June 24, 1983, in order to address that specific issue, Unger filed a Motion to Reconsider the Order of June 6, 1983. The motion of June 24, 1983, directed the court's attention to the failure of the court to follow Rule 34 of the Federal Rules of Appellate Procedure which requires oral argument in all cases. A copy of this motion is included as Appendix B. In addition to the motion, Unger filed a Memorandum in Support of the Motion. A copy of this Memorandum is included as Appendix C.

On July 22, 1983, Judge Cummings and Judge Cudahy, two members of the panel, denied the motion on two grounds: first, that the attorney for Unger did not request oral argument on the remand; and second, that Unger did not seek a Petition for Rehearing after the November 26, 1982, order on the remand but, instead, chose to seek certiorari. A copy of this order is included as Appendix A.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The action of the Court of Appeals in hearing the substantive issues on the remand was in gross violation of Rule 34 of the Federal Rules of Appellate Procedure. Rule 34, with exceptions not here relevant, is explicit and states:

"Oral argument shall be allowed in all cases. . . ."

When the Court of Appeals for the Seventh Circuit determined the issues on the remand without oral argument, it "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a), Rules of the Supreme Court.

There is a clear tension between the busy schedule of the Courts of Appeals and the overriding requirement of Rule 34 that oral argument shall be permitted except in a very limited class of cases following closely defined procedures. The Court of Appeals made no effort to comply with Rule 34. An order of this court to the Court of Appeals that it erred in hearing the case without oral argument will stand as a strong reminder of all Courts of Appeals that, no matter how great the pressure on the court's time, Rule 34 is of fundamental importance and must be followed.

The requirement of oral argument in Rule 34 is not merely advisory. As noted by Moore, its purpose is to "preclude" Courts of Appeal from dispensing with oral

argument. 9 Moore's Federal Practice, Ch. 34, Section 234.01ff. Moore states:

> "Rule 34(a) is patterned after the recommendations of the Commission on the Revision of the Federal Court Appellate System. First, it precludes the Courts of Appeal from dispensing with oral argument except on the basis of local rule. Second, it assures the right to argue orally unless a panel of three judges, after examination of the briefs and record is unanimously of the opinion that oral argument is not needed. Third, it sets an outer limit to local rules by describing the type of cases in which, under such a rule, oral argument can be denied, and fourth, it assures a litigant an opportunity to state why, in his case, oral argument should be heard."

Rule 34 did not spring full blown from the brow of Zeus. It represented the considered opinion of the jurists and members of the bar who were members of the Commission on Revision of the Federal Court Appellate Systems. The Commission recognized the importance of oral argument and recommended the adoption of Rule 34 requiring oral argument. The Commission's comment, which led to the rule, speaks for itself:

> "Over the years, a rich literature has developed on the role of oral argument, providing valuable insights of persevering value. Distinguished jurists, some of whom served in less pressured times, have contributed significantly to that literature, providing the perspective of the bench. Some comments simply state a conclusion based on long experience; some are couched in striking rhetoric reflecting deeply held views. Twenty years ago Chief Judge John Biggs, Jr., expressed the hope that 'the day will never come when oral argument is dispensed with,'

adding that if that day were to come, 'I personally should have the feeling that I was sitting in the rear of those dispensing slots in the cafeteria, dispensing some kind of cafeteria justice.'

"No argument is more compelling than the fact that many judges find that the opportunity for a personal exchange with counsel makes a difference in result. Mr. Justice Brennan observed at the Third Circuit Judicial Conference in 1972: 'I have had too many occasions when my judgment of a decision has turned on what happened in oral argument, not to be terribly concerned for myself were I to be denied oral argument.' Some have tried to explain why this should be so. For Judge Herbert F. Goodrich it is a function of the particular judge. 'Some people,' he wrote, 'get ideas better by hearing than by reading,' a thought echoed some years later by Mr. Justice Harlan. The latter went on to describe the process in greater detail:

> [O]ral argument gives an opportunity for interchange between court and counsel which the briefs do not give. For my part, there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.

"To a great degree, these perceptions are reflected in the attitudes of the practicing attorneys. An impressive 90 percent of the attorneys in each of the three circuits agreed that judges are better able to avoid erroneous interpretations of the facts or issues in the case if they can direct questions to counsel, and that oral argument permits the attorney to address himself to those issues which the judges believe are crucial to the case." Commission on Revision of the Federal Court Appellate System

"Structure & Internal Procedures: Recommendations for Change," Washington, D.C., June 1975.

The Court of Appeals was deciding the intricate and critical issue of retroactivity on the remand. It chose to decide that issue without hearing oral argument. Unger thereby lost her Rule 34 right to have her attorney argue this new and pivotal issue of retroactivity before the Court.

When Unger received notice of the refusal of the Petition for Certiorari, she immediately began the process of seeking leave for the expansion of the time for the Petition for Rehearing and the allowance of oral argument. It was only after three motions addressed to the Court of Appeals that the Court admitted that it had authority to expand the time for filing the Petition for Rehearing. Order, June 6, 1983, Appendix D.

After the ruling of the Court of June 6, 1983, that it had authority to expand the time, Unger then filed her motion asserting that the failure to follow Rule 34 was of sufficient importance that the Court of Appeals should exercise its authority to expand the time in order to permit the Petition for Rehearing and to hear oral argument thereon. Motion, June 24, 1983, Appendix B. The Motion was denied on July 22, 1983. Order, Appendix A.

The order of denial did not address the fundamental importance of Rule 34. Instead it merely stressed the procedural history of the case, the denial of the earlier Petition for Certiorari and the fact that counsel for plaintiff had not requested oral argument. The procedural history of the case and the denial of the earlier Petition do not bear directly on the question of whether Rule 34 is of sufficient importance for the Court to

exercise its admitted power to expand the time for filing the Petition for Rehearing. Neither is there any requirement that counsel for the plaintiff request oral argument. To the contrary, Rule 34(b) of the Rules of Appellate Procedure is specific that the clerk merely notifies the parties of the "time and place" for oral argument. Where the court decides that it will not schedule oral argument it must then notify counsel of the decision and in that case Rule 34(a) of the Federal Rules of Appellate Procedure and related Local Rule 14(f) of the Rules of the Court of Appeals for the Seventh Circuit apply. Counsel, in that case, is given "an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard." Rule 34(a). Even so, the rule is further explicit that oral argument must be allowed "unless:

(1) The appeal is frivolous; or
(2) The dispositive issue or set of issues has been recently authoritatively decided; or
(3) The facts and legal arguments are adequately presented in the briefs and records and the decisional process would not be significantly aided by oral argument."

This case, involving the serious issue of retroactivity treated by the court in an extensive opinion on remand, clearly did not fall within the exceptions to oral argument.

The Rule 34, requirement of oral argument raised in Unger's motion was completely avoided in the order of July 22, 1983. If the right to oral argument is essential, the Court of Appeals should have taken this opportunity to correct its error in deciding the case on remand without oral argument. There is no reason to refuse

such a request in a case where Unger has lost substantial compensatory damages for proven discrimination awarded at trial and appeal-not because of substantive error but because the Court of Appeals, on remand, without oral argument, determined that the *Kremer* rule should be applied retroactively. The necessity of a decision on the question of retroactvity was noted in the remand order of this Court. The question of retroactivity was entirely new to the case. By its nature, the question involved intricate and subtle questions of policy, fact, and law. Certainly, Rule 34 requires that the Court set such a critical issue for oral argument. Since the argument of the discrimination issue on appeal before the original panel, which held in Unger's favor on August 14, 1981, Unger's counsel has seen all of his client's earlier won rights lost on the entirely new issue of retroactivity without ever having stood before a court to explain his client's position. The clear mandate of Rule 34 dictates the allowance of oral argument even though it requires the expansion of the time for filing the petition for rehearing.

In the series of motions before the Court of Appeals, Unger vigorously pursued the right to oral argument with the full knowledge that, even with oral argument, she must still change the articulated opinion and judgment of the Court of Appeals. Yet, Unger pursues this remedy with the conviction that rehearing of this case with oral argument will be of significant help to the Court of Appeals in its perception of the *Unger* case and the reasons why *Kremer* should not have been applied retroactively so as to deny to Unger the relief which had been awarded to her because of the discriminatory conduct of the defendant.

CONCLUSION

On the original Petition for Certiorari filed by Consolidated Foods Corporation, this court did not take the case on briefs and argument but simply remanded for consideration by the Court of Appeals. It is respectfully urged that this Court need not do more in this case than remand to the Court of Appeals with direction to grant rehearing with oral argument in order to comply with the requirements of Rule 34.

Respectfully submitted,

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APPENDIX A

ORDER OF JUDGES WALTER J. CUMMINGS AND RICHARD D. CUDAHY DENYING MOTION TO RECONSIDER ORDER OF JUNE 6, 1983

Entered July 22, 1983

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO RECONSIDER ORDER OF JUNE 6, 1983 DENYING MOTION" filed herein on June 24, 1983, by counsel for plaintiff-appellee, cross-appellant.
2. "MOTION FOR RECALL OF MANDATE" filed herein on June 24, 1983, by counsel for plaintiff-appellee, cross-appellant.

Counsel for plaintiff disingenuously states that it is manifestly unfair to deny oral argument on remand in this single case where the district court found in favor of plaintiff Trudy Unger and this court affirmed. What counsel has failed to mention is that this court's judgment was vacated by the Supreme Court of the United States.

On remand, counsel for both parties filed statements of their positions as to the action to be taken by this court pursuant to Circuit Rule 19. Counsel for plaintiff did not request oral argument at that time.

Taking into consideration the Supreme Court order remanding this case and the Circuit Rule 19 statements filed by both parties, this court entered a new judgment and opinion on November 26, 1982.

Plaintiff did not bring a petition for rehearing within the time prescribed. Plaintiff instead chose to go di-

rectly to the Supreme Court to file a petition for writ of certiorari. The Supreme Court declined to grant certiorari.

Counsel for plaintiff now claims plaintiff was denied the procedural safeguards that counsel deliberately chose to by-pass. This court has twice denied motions requesting leave to file a petition for rehearing after a petition for certiorari has been denied. Counsel now files yet another repetitious motion requesting reconsideration of those denials and a motion to recall the mandate.

We find that the plaintiff in this case was afforded the full procedural protections provided by the rules. Accordingly,

IT IS ORDERED that the motion to reconsider order of June 6, 1983 denying motion and the motion for recall of mandate are denied.

APPENDIX B

MOTION TO RECONSIDER ORDER OF JUNE 6, 1983 DENYING MOTION

Filed by Unger June 24, 1983

TO: The Panel on Decision on Remand of November 26, 1983

The Honorable Walter J. Cummings, Chief Judge
The Honorable Howard T. Markey
The Honorable Richard D. Cudahy

Plaintiff-appellee and cross-appellant, Trudy Unger, by her attorneys, John A. Cook and Mary J. Walsh, respectfully moves this court to reconsider its Order entered June 6, 1983 denying the "Motion to Judges en banc of the Court of Appeals of the Seventh Circuit to Reconsider Denial of Motion for Extension of Time and to Allow Filing of Petition for Rehearing Instanter" on the following grounds:

1. The Order of June 6, 1983 admits the error of earlier rulings of this court of April 28, 1983 and May 11, 1983 and holds that the court did have the power "to expand the time for filing a petition for rehearing."

2. Having so held, the Order of June 6, 1983 concludes that "this case does not warrant such an expansion" without further explanation. That conclusion was erroneous on the grounds hereinafter set forth.

3. The motion to which the Order of June 6, 1983 relates concerned the decision of this court entered November 26, 1982 on remand from the United States Supreme Court which was entered solely on concurrently filed statements of position filed by opposing parties and with no opportunity for briefs in opposition as is cus-

tomary in contested matters in the normal practice of Courts of Appeal. (Federal Rules of Appellate Procedure for the United States Courts of Appeal, Rule 28 (a),(b),(c).)

4. The decision of November 26, 1982 was made without hearing oral argument.

5. Before entering its decision of November 26, 1982, this court failed to set the case for oral argument as required by Rule 34 of the Federal Rules of Appellate Procedure which provides that oral argument is mandatory in the following language: "Oral argument *shall be allowed in all cases.*"

6. Rule 34 permits hearing without oral argument only where provided under local rule with stringent conditions and procedures. Rule 14(f) of the rules of the Seventh Circuit establishes such conditions and procedures to be followed where a case is to be heard without oral argument. Those conditions and procedures were not followed. (See Affidavit of John A. Cook, Exhibit A).

7. The violation by this court of the general rules applicable to all Circuit Courts of Appeal and of its own rule should be sufficient to "warrant the expansion" of the time for filing Petition for Rehearing in order to meet the requirements of the rules applicable to this court with respect to oral argument which was specifically requested in the motion denied by the order of this court on June 6, 1983.

8. It is manifestly unfair to deny oral argument in this single case where it is allowed in all other cases (with the limited exception of cases to which local Rule 14(f) applies) particularly where:

A. The district court in favor of Trudy Unger on the existence of discrimination in employment and that finding was affirmed by this court on appeal; and

B. The district court found substantial damages ($141,190.82) to the injured employee which related

solely to the recovery of the economic loss suffered by Trudy Unger over an 8-year period from 1973 to 1980. That judgment involved no elements of interest or punitive damage.

9. The judgment awarding Trudy Unger recovery for serious economic loss due to sex discrimination in employment, fairly obtained in difficult litigation against a major corporation, should not be lost in proceedings in which the substantial issues relating to retroactivity or nonretroactivity were decided without oral argument.

10. This court should zealously preserve the right of the individual litigant to the full procedural protections required by the rules under which it is required to function.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

EXHIBIT A

AFFIDAVIT OF JOHN A. COOK

John A. Cook, being first duly sworn, on oath deposes and states that:

1. He is one of the attorneys for Trudy Unger, Case 80-2792 and 80-2844 consolidated in the United States Court of Appeals for the Seventh Circuit.

2. Following the filing of the Statement of Position on Remand on July 2, 1982, he received no notice by the Clerk of the Court of Appeals concerning the setting of the case for oral argument as required by Rule 34(a) of the Federal Rules of Appellate Procedure and no notice by the Clerk of the Court under Circuit Rule 14(f) that the court had determined not to hear oral argument and giving each party the opportunity to file a statement setting forth the reasons why, in the opinion of the party, oral argument should be heard.

3. On June 22, 1983, affiant checked the records in the office of the Clerk of the United States Court of Appeals for the Seventh Circuit with respect to both the file and the court docket and found no record of any setting of the case on remand for oral argument or notice to counsel thereof, no order of the court that oral argument would not be allowed, and no notice by the Clerk pertaining to any such order giving the opportunity to be heard on any such decision denying oral argument.

AND FURTHER AFFIANT SAYETH NOT.

/s/ JOHN A. COOK, Affiant

SUBSCRIBED AND SWORN to
before me this 23 day of June, 1983.

.....
Notary Public

APPENDIX C

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER ORDER OF JUNE 6, 1983 DENYING MOTION

Filed by Unger June 24, 1983

In the order of June 6, 1983, this Court denied Trudy Unger's "Motion to Judges en banc of the Court of Appeals of the Seventh Circuit to Reconsider Denial of the Motion for Extension of Time and to Allow Filing of Petition for Rehearing Instanter." The court agreed with the first part of that motion that it had the power to expand the time for filing the petition for rehearing. After so finding, it considered the Motion on the merits and refused to grant the motion on the grounds that the case did not "warrant such an expansion of time." The Motion to Reconsider the Order of June 6, 1983 asserts that that decision was in error in holding that the issues of this case did not warrant an expansion of time.

The principle ground of the Motion To Reconsider was that the failure to grant oral argument on the remand from the United States Supreme Court was substantial error and sufficient to "warrant an expansion of time" to file the petition for rehearing in order to permit oral argument on the substantive issues before the court and decided in its opinion of November 26, 1982. *Unger* v. *Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir., 1982) The issues were substantial and were heard without oral argument in violation of Rule 34 of the Federal Rules of Appellate Procedure.

Rule 34 of the Federal Rules of Appellate Procedure is mandatory on the allowance of oral argument. It provides:

"Oral argument shall be allowed in all cases. . ."

After the quoted language, the Rule allows certain closely limited exceptions, establishes a procedure which must be followed where oral argument is denied, and requires a local rule to implement that exception. This court, in local Rule 14(f), incorporates the requisite procedures and conditions. Neither Rule 34 nor Rule 14(f) were followed when this court heard this case on remand without oral argument.

The subject is treated and the background for Rule 34 described in Moore's Treatise on Federal Practice. 9 *Moore's Federal Practice*, Chap. 34, ¶234.01ff *Moore* notes the purpose of the rule is to preclude Courts of Appeal from dispensing with oral argument. This was in accordance with the recommendations of the Commission on Revision of the Federal Court Appellate System. *Moore* states at page 34-6 of Chapter 34:

> "Rule 34(a) is patterned after the recommendations of the Commission on Revision of the Federal Court Appellate System. First, it precludes the Courts of Appeals from dispensing with oral argument except on the basis of local rule. Second, it assures the right to argue orally unless a panel of three judges, after examination of the briefs and record, is unanimously of the opinion that oral argument is not needed. Third, it sets an outer limit to local rules by describing the type of cases in which, under such a rule, oral argument can be denied, and fourth, it assures a litigant an opportunity to state why, in his case, oral argument should be heard."

Rule 34 limits the cases in which oral argument can be denied to the following:

> "1. The appeal is frivolous; or
>
> "2. The dispositive issue or set of issues has been recently authoritatively decided; or
>
> "3. The facts and legal arguments are adequately presented in the briefs and record and the decisional

process would not be significantly aided by oral argument." (Rule 34, par. (a).)

On any reading, the issues before the court on the remand would not be within any of these exceptions to oral argument. Even if they were, Rule 34 requires that the party being denied oral argument be notified and be given "an opportunity to file a statement setting forth the reasons why, in his opinion, oral argument should be heard." Rule 14(f) of the local rules exactly tracks the requirements of Rule 34. This court, in deciding the issues on remand, acted totally outside the requirements of both Rule 34 and its own local rule.

The court failed to hear oral argument on the Statements of Position and there was no order by the unanimous panel of three judges denying oral argument as required by Rule 34 and Circuit Rule 14(f). In addition, this case did not fall within any of the three exceptions to oral argument set out in Rule 34 and local Rule 14(f). First, the case in no way concerned a "frivolous appeal." Second, the dispositive issue of non-retroactivity raised in the Statements of Position had not been "recently authoritatively decided." Justice Blackmun in the remand order specifically noted that the issue of retroactivity or nonretroactivity of the Supreme Court decision in *Kremer* v. *Chemical Construction Corp.*, 452 U.S. 960 (1982) should be considered. Indeed, the extended opinion of this court and its order for publication clearly indicates the importance and seriousness of the question. Finally, in this case, the facts and legal arguments were not "adequately presented in the briefs." The only briefs filed on the remand were simultaneous Statements of Position presented without opportunity to respond to the issues raised with no effort to follow the usual procedure of opening brief, answering brief and reply brief.

The error in omitting oral argument on the issues of the remand apparently derived from Local Rule 19 which the parties were ordered to follow. Local Rule 19 has no counterpart in the Federal Rules of Appellate Procedure. It contemplates simultaneous statements of position and appears to be designed only for the disposition of relatively routine housekeeping details on remand. In contrast, the remand in this case concerns substantial issues of nonretroactivity or retroactivity of the same order as the issues treated by the court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). The fact that those issues were to be determined by the Court of Appeals rather than the United States Supreme Court did not make the issues any less substantial. In this case, Rule 34 of the Federal Rules of Appellate Procedure and local Rule 14(f) were controlling.

In conclusion, in view of this court's admitted authority to expand the time for filing a Petition for Rehearing and in view of Rule 34's requirement of oral argument and this court's failure to hear oral argument on the issues on remand before making its decision of November 26, 1982, the plaintiff's Motion for Extension of Time for Filing the Petition for Rehearing should be allowed and the case set for oral argument.

Respectfully submitted,

/s/ John A. Cook
John A. Cook

/s/ Mary J. Walsh
Mary J. Walsh
Attorneys for Plaintiff-Appellee and Cross-Appellant

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APPENDIX D

ORDER ENTERED BY JUDGES WALTER J. CUMMINGS AND RICHARD D. CUDAHY DENYING MOTION OF UNGER FILED MAY 16, 1983

Entered June 6, 1983

On consideration of the "MOTION TO JUDGES EN BANC OF THE COURT OF APPEALS OF THE SEVENTH CIRCUIT TO RECONSIDER DENIAL OF MOTION FOR EXTENSION OF TIME AND TO ALLOW FILING OF PETITION FOR REHEARING INSTANTER" filed herein on May 16, 1983 by counsel for plaintiff-appellee, cross-appellant,

IT IS ORDERED that said motion is hereby DENIED. Although the court has the power to expand the time for the filing of a petition for rehearing, this case does not warrant such an expansion.

APPENDIX E

MOTION TO JUDGES EN BANC OF THE COURT OF APPEALS OF THE SEVENTH CIRCUIT TO RECONSIDER DENIAL OF MOTION FOR EXTENSION OF TIME AND TO ALLOW FILING OF PETITION FOR REHEARING INSTANTER

Filed by Unger May 16, 1983

TO: The Honorable Judges of the United States Court of Appeals for the Seventh Circuit, en banc

TO: The Panel on Decision on Remand of November 26, 1983
The Honorable Walter J. Cummings, Chief Judge
The Honorable Howard T. Markey, and
The Honorable Richard D. Cudahy

Plaintiff-appellee and cross-appellant, Trudy Unger, by her attorney, respectfully moves the judges en banc of this court or the Panel on Remand to reconsider denial of her Motion for Extension of Time for filing her Petition for Rehearing of the decision of this court and to permit the filing of the Petition, instanter, provide for the rehearing en banc, or if not en banc, by the panel and to set cause for oral argument and as grounds for this motion states:

1. On April 25, 1983, pursuant to the provisions of Rules 40 and 26(b) of the Federal Rules of Appellate Procedure for the United States Courts of Appeal (hereinafter referred to as F.R.A.P.) plaintiff-appellee and cross-appellant, Trudy Unger, by her attorney, filed her:

> **"Motion to Extend Time for Filing Petition for Rehearing and for Stay or Recall of Mandate"**

a copy of which is attached hereto as Exhibit A. [Copy not attached: See Appendix G for motion]

2. On April 28, 1983 by order of Chief Judge Cummings, sitting individually, the motion was denied as not timely filed.

3. Subsequently, on May 2, 1983, plaintiff-appellee and cross-appellant, Trudy Unger, by her attorney, attempted to file a Motion for Reconsideration addressed to the court en banc and was advised by the manager of the Clerk's office that the motion would not be accepted for filing and that a motion for leave to file the motion would be required.

4. On May 5, 1983, movant filed a Motion for Leave to File the Motion for Reconsideration addressed to the court en banc and said motion was denied by the order of Judge Cummings, sitting singly, dated May 11, 1983.

5. On May 16, 1983, upon inquiry, counsel for movant was informed by the Clerk's office that the Motion for Reconsideration addressed to the court should have been accepted for filing and that counsel would be able to file the motion, being this motion now presented for filing and consideration instanter.

6. There has been no rehearing of the decision of this court entered November 26, 1982.

7. This court, at the date of filing the Motion to Extend the Time for Filing Petition for Rehearing and for Stay or Recall of Mandate had jurisdiction of this cause and F.R.A.P. 40 and 26(b) contemplate that the court may expand the time for filing a Petition for Rehearing. In *Braniff Airways, Inc.* v. *Curtiss Wright Corp.*, 424 F.2d 427, 429 (2d Cir. 1970), *cert. denied,* 91 S.Ct. 59, 400 U.S. 829, 27 L.Ed.2d 59, the Second Circuit held that it had the power to enlarge the time for filing the Petition for Rehearing under F.R.A.P. 26(b) and 40 even after the time for rehearing had expired.

8. The ruling of Chief Judge Cummings that the Motion was not timely filed erroneously denies the juris-

diction of this court to enlarge the time for filing and does not reach the substance of the Motion.

9. It is unjust and inequitable to deny the Motion to enlarge the time for filing the Petition for Rehearing in that:

A. The District Court found and entered Judgment that Trudy Unger was the victim of discrimination in employment, and this court affirmed that decision.

B. That finding of discrimination at trial, affirmed on appeal, was reversed in this court's decision of November 26, 1982, solely by the change in procedural law later enunciated in *Kremer* v. *Chemical Construction Corp.*, 456 U.S. ....., 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982).

C. The question before this court is whether the decision of the United States Supreme Court in *Kremer* should be applied retroactively or prospectively.

D. This was a classic case in which to apply a procedural rule prospectively under the test enunciated in *Chevron Oil Company* v. *Huson*, 404 U.S. 97 (1971). However, in its decision of November 26, 1982, this court refused to limit the application of Kremer to prospective matters and applied it retroactively to Unger. *Unger* v. *Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir., 1982).

E. This court has not heretofore been asked to reconsider its decision of November 26, 1982 on the remand from the United States Supreme Court.

F. If the ruling of this court in its decision of November 26, 1982 was erroneous, such error should not be protected by the refusal to allow the filing of the Petition for Rehearing within an expanded time period.

G. The Petition for Rehearing is normally a matter of right, and that right should not be lost merely

because the Petitioner sought to obtain certiorari from the United States Supreme Court as the most expeditious manner of reaching the question of retroactivity by the court, which enunciated the *Kremer* decision, in particular where substantive rights have been lost by the plaintiff in the second opinion of this court entered on November 26, 1982, without oral argument or responsive briefing. Since certiorari has been denied by the Supreme Court, the substantive issue has not been reached and should be considered on the Petition for Rehearing.

H. The original decision of the panel of November 26, 1982 neglected the manifest purpose and spirit of the *Chevron* rule and was a decision entered:

1. Without the benefit of oral argument by counsel, contrary to the normal practices of this court: and
2. Without the benefit of responsive briefs to the assertions made by respective counsel.

10. The submission and consideration of a Petition for Rehearing does not prejudice either party to the litigation. The refusal to hear the Petition for Rehearing unduly prejudices Trudy Unger, the party who originally prevailed on the substantive issues and will not now be fully heard.

11. This honorable Court of Appeals of the Seventh Circuit should not countenance a refusal of rehearing where the court, in its decision on the remand, had reversed a substantive decision of the district court on the issue of discrimination which had been affirmed on appeal, merely because of a change in procedural law many years after the case was filed.

12. The decision of the Court of Appeals of November 26, 1982 resulted in a fundamental injustice which requires the general supervision of this court, en banc, to review that erroneous decision.

13. Included with this Motion is a copy of the Petition for Rehearing, proposed to be filed, so that if the Motion is allowed and leave is granted to file the Petition, the required number of copies can be filed and this cause can promptly be set for hearing en banc. [Petition for Rehearing not reproduced since not necessary for issues on Petition for Certiorari]

14. Movant further respectfully requests that the order of April 28, 1983 denying the Motion to Extend Time for Filing Petition for Rehearing and for Stay or Recall of Mandate be reviewed by this court pursuant to F.R.A.P. 27(c) which provides that the action of a single judge may be reviewed by the court.

WHEREFORE, Trudy Unger, plaintiff-appellee and cross-appellant, by her attorney, respectfully prays and moves that this court, either sitting en banc or as a panel, extend the time for filing the Petition for Rehearing to the date of its order and communication of that order to counsel for Trudy Unger, plaintiff-appellee and cross-appellant, with the Petition for Rehearing to be thereupon filed, instanter, and that the cause be set for oral argument before the court, either sitting en banc or as a panel, to a short date.

CERTIFICATE OF SERVICE

I, John A. Cook, hereby certify that a true copy of the foregoing document is being served concurrently with the filing hereof with the Clerk of the Court of Appeals this 16th day of May, 1983 by hand-delivery on the following:

David J. Parsons, Esq.
Seyfarth, Shaw, Fairweather &
Geraldson
Suite 4200
55 East Monroe Street
Chicago, Illinois 60603

/s/ John A. Cook
John A. Cook

APPENDIX F

ORDER OF JUDGE WALTER J. CUMMINGS DENYING MOTION TO EXTEND TIME FOR FILING PETITION FOR REHEARING AND FOR STAY OR RECALL OF MANDATE

Entered April 28, 1983

On consideration of the "MOTION TO EXTEND TIME FOR FILING PETITION FOR REHEARING AND FOR STAY OR RECALL OF MANDATE" filed herein on April 25, 1983, by counsel for the plaintiff-appellee and cross-appellant, Trudy Unger,

IT IS ORDERED that said motion is hereby DENIED as untimely.

APPENDIX G

MOTION TO EXTEND TIME FOR FILING PETITION FOR REHEARING AND FOR STAY OR RECALL OF MANDATE

Filed by Unger April 25, 1983

TO: The Honorable Judges of the United States Court of Appeals for the Seventh Circuit and to The Panel on the Decision on Remand of November 26, 1983, The Honorable Walter J. Cummings, Chief Judge, The Honorable Howard T. Markey, Chief Judge, United States Court of Appeals for the Seventh Circuit, Sitting by Designation, and The Honorable Richard D. Cudahy, Circuit Judge:

Plaintiff-Appellee and Cross-Appellant, Trudy Unger, by her attorney, respectfully moves this Court:

A. For an order, pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure for the United States Court of Appeals, to enlarge the time to April 30, 1982 for filing the Petition for Rehearing by Trudy Unger of the order and opinion of this court entered November 26, 1982 or, in the event that this court has not acted on this motion on or before April 30, 1982, to the day following any action on this motion allowing the extension of the time of filing the Petition for Rehearing.

B. For a Stay of Mandate or, if the Mandate has been issued to the District Court, for its recall until the disposition of this motion or until the disposition of the Petition for Rehearing if the court enlarges the time for filing the Petition for Rehearing.

As grounds for this motion, Trudy Unger states:

1. Following the opinion of this court of November 26, 1982 on the remand from the United States Supreme

Court, she duly notified the Clerk of this court and filed and presented her Petition for Certiorari before the United States Supreme Court as 82-1426 in the current term.

2. On April 20, 1983, her attorney received written notice dated April 18, 1983 from the Clerk of the United States Supreme Court that the Petition for Certiorari had been denied and that Mr. Justice Blackmun had voted in favor of the grant of certiorari. The refusal of the Petition for Certiorari did not reach the substance of any errors that may lie in the opinion of this court of November 26, 1982.

3. A Petition for Rehearing has not heretofore been filed and there can be no prejudice to Consolidated Foods Corporation, defendant-appellant and cross-appellee, in permitting a Petition for Rehearing to be filed inasmuch as, upon the denial of the Petition for Certiorari, there has been no previous request for rehearing nor any review of any error that may lie in the opinion of this court entered November 26, 1982.

4. It is respectfully submitted that this court erred in its opinion of November 26, 1982. As an indication of various points which may be raised on the Petition for Rehearing, there is attached hereto as Exhibit A a copy of pages 7 through 24 of the Petition of Certiorari which sets forth reasons why the rule of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971) was incorrectly applied by this court in its decision of November 26, 1982 holding adversely to Trudy Unger and thereby changing its earlier affirmance of the judgment of the District Court entered August 14, 1981.

5. Antidiscrimination is an underlying and pervasive public policy in the United States. Yet, discrimination, particularly at the individual level, is often the most difficult of cases to prove because of its inherently subtle nature. If *Kremer* v. *Chemical Construction Corp.*, 456 U.S. ....., 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982)

is to be applied retroactively, the effect is that a carefully considered finding of discrimination by a Federal District Judge after full trial and affirmance on appeal to this court, is to be made subordinate to a recommendation made in a non-judicial trial by a state hearing officer. It is respectfully submitted that this unusual result requires the reconsideration of the decision of this court that Kremer should be applied retroactively and that Trudy Unger did not meet the standards of the *Chevron* test.

6. As a result of the application of Rule 19 of this court with respect to remand, on the original remand from the United States Supreme Court, plaintiff-appellee and cross-appellant lost two important rights, being:

A. The normal right to consider the issues raised by opposing counsel and to respond to those issues. As a result of the structure of the rules of this court on the remand which contemplated the simultaneous filing of statements of position on remand, Trudy Unger did not have the opportunity to respond to the statements made by Consolidated Foods Corporation on its statement of position on the remand. A Petition for Rehearing will permit Trudy Unger to direct this court's attention to the conflict between its decision and the normal rules of non-retroactivity as enunciated in *Chevron Oil Company* v. *Huson*, 404 U.S. 97 (1971).

B. The normal right to present and argue the issues of her case orally. If this court permits the filing of the Petition for Rehearing, it is the intention of Trudy Unger, plaintiff-appellee and cross-appellant, to request oral argument before the panel.

7. This Motion is not interposed for delay and there will be no delay since the Petition for Rehearing is ready for filing.